Shivnath Rai Harnarain (India) Ltd v The Owners of The Ship or Vessel MV 'Win Moony' (LR 8204846) of The Port of Valletta, Malta

HIGH COURT (MELAKA) — ADMIRALTY IN REM NO MT 1–27–2 OF 2004
LOW HOP BING J
6 OCTOBER 2004

Constitutional — Jurisdiction — High Court — Whether admiralty jurisdiction of court properly invoked — Supreme Court Act 1981 (UK) s 20(2)(h), Courts of Judicature Act 1964 s 24(b)

Shipping and Navigation — Action in rem — Arrest of ship — Ex parte application — Contract of carriage — Whether mate's receipt a contract of carriage — Whether claim be struck off in absence of contract between parties — Damages for wrongful arrest — Whether malice and gross negligence be proven — Rules of the High Court 1980 O 18 r 19(1)(b), Supreme Court Act 1981 (UK) ss 20(2)(h), 21(4)

Shipping and Navigation — Admiralty — Jurisdiction — High Court — Whether admiralty jurisdiction of court properly invoked — Supreme Court Act 1981 (UK) s 20(2)(h), Courts of Judicature Act 1964 s 24(b)

The plaintiff had claimed, inter alia, for a declaration that defendant do issue a clean bill of lading to them. The plaintiff entered into a charterparty with Able Shipping Line, through Manco Shipping Co ('the charterparty'), for the use and hire of the vessel MV Win Moony ('the vessel'), for the carriage of 11,500 mt of bulk maize ('the cargo'), in return for payment of freight of USD25 per mt. The vessel was under a voyage charter by Able Shipping Line from the defendant. The plaintiff alleged that notwithstanding the availability of the cargo, the officers and crew of the vessel, at the instructions of the defendant, had wrongfully and in breach of duty, sailed out of the loading port without loading 2933 mt of the cargo, which resulted in the plaintiff suffering losses. The plaintiff claimed alleged that the defendant acknowledged receipt of 8567 mt of the cargo on board the vessel and, agreed with and represented to the plaintiff, to issue a bill of lading for the cargo evidenced inter alia by a mate's receipt issued by the chief officer of the vessel.

The plaintiff further alleged that the defendant has failed to issue the bill of lading in respect of 8567 mt of the cargo received on board the vessel despite plaintiff making full payment for the freight under protest. The defendant wanted to issue conditional bill of lading but the plaintiff refused on the ground it departed from mate's receipt. The plaintiff, vide an ex parte application, obtained warrant of arrest and arrested the ship. The defendant applied to this court for an order to strike out the plaintiff's writ of summons and the warrant of arrest issued against the defendant on the grounds, inter alia that: (1) the plaintiff's claim did not fall within s 20(2)(h) of the Supreme

Court Act 1981 (UK) ('the Act') and accordingly the admiralty jurisdiction of this court was not properly invoked, since there was no agreement relating to the carriage of goods in the vessel between plaintiff and defendant; (2) the plaintiff's ex parte application did not contain a full and frank disclosure of material facts.

Held, allowing the defendant's application with costs:

(1) Pursuant to s 20(2)(h) the Act, the jurisdiction of the court may properly be invoked if there is an agreement relating to the carriage of goods in the vessel between the plaintiff and the defendant at the time the writ in rem was issued and the vessel was arrested. A mate's receipt has been described as a chose in action, but it is not a contract of carriage. Therefore, the plaintiff's claim did not arise out of an agreement of carriage under s 20(2)(h). As such, the plaintiff has wrongly invoked the admiralty jurisdiction of this court and hence their claim was frivolous or vexatious under O 18 r 19(l)(b) (see paras 42, 47, 56 and 76).

(2) In the absence of any contract between the plaintiff and the defendant, as required under s 20(2)(h) of the Act, there is no legal basis for the plaintiff to obtain a clean bill of lading from the defendant (see para 63).

(3) The power to issue a warrant of arrest under O 70 r 4 is discretionary and therefore must be exercised judicially having regard to all established judicial principles, after considering relevant facts and circumstances, more so in ex parte applications which are applications *uberrimae fidei* requiring full and frank disclosure of all material facts (see para 86).

(4) The defendant has successfully established malice or gross negligence and that the arrest of the vessel is wrongful, for which the defendant was entitled to an award of damages (see para 103).

[**Bahasa Malaysia summary**

Plaintif telah menuntut, antara lain, untuk deklarasi bahawa defendan berhak memberikannya bil muatan yang bersih. Plaintif memasuki carterparti dengan Able Shipping Line melalui Manco Shipping Co ('carterparti tersebut'), untuk penggunaan dan penyewaan pengangkutan kapal MV Win Moony ('kapal tersebut') untuk mengangkut 11,500 mt bertih jagung ('kargo tersebut') sebagai balasan untuk pembayaran muatan sebanyak USD25 per mt. Kapal tersebut berada di bawah carter pelayaran oleh Able Shipping Line daripada defendan. Plaintif mengadu bahawa walaupun dengan adanya kargo tersebut, pegawai dan anak kapal, kapal tersebut, atas arahan defendan, secara melanggar dan memungkiri tanggungjawab mereka dengan berlayar tanpa mengangkut 2933 mt kargo tersebut, yang mana menyebabkan plaintif

mengalami kerugian. Plaintif mendakwa bahawa defendan mengaku terima 8567 mt kargo tersebut dalam kapal dan, telah bersetuju dan menyatakan kepada plaintif untuk mengeluarkan bil muatan untuk kargo tersebut, antara lain, melalui resit 'mate's' dikeluarkan oleh Ketua Pegawai kapal tersebut. Plaintif juga mendakwa bahawa defendan gagal mengeluarkan bil muatan berkenaan dengan 8567 mt kargo tersebut yang diterima atas kapal walaupun plaintif telah membuat bayaran penuh untuk muatan dengan bantahan. Defendan hendak mengeluarkan bil muatan bersyarat tetapi plaintif menolaknya atas alasan ia bercanggah dengan resit 'mate's'. Plaintif, melalui suatu permohonan ex parte, telah mendapatkan waran tangkap dan menangkap kapal tersebut. Defendan memohon ke mahkamah ini untuk membatalkan writ saman dan waran tangkap yang diperolehi oleh plaintif terhadap defendan atas alasan, anata lain, bahawa: (1) tuntutan plaintif tidak termasuk dalam s 20(2)(h) Akta Mahkamah Agong 1981 (UK) ('Akta tersebut') dan oleh demikian bidang kuasa admiralti mahkamah ini tidak dibangkitkan dengan betul, kerana tiada perjanjian mengenai pengangkutan barangan dalam kapal tersebut di antara plaintif dan defendan; (2) permohonan ex parte plaintif tidak mengandungi pendedahan fakta material dengan penuh dan jujur.

Diputuskan, membenarkan permohonan dengan kos:

(1) Menurut s 20(2)(h) Akta tersebut, bidang kuasa mahkamah boleh dibangkitkan dengan betul jika terdapat perjanjian mengenai muatan barangan di dalam kapal tersebut di antara plaintif dan defendan semasa writ in rem dikeluarkan dan kapal tersebut ditangkap. Resit 'mate's' telah dikatakan sebagai hak dalam tindakan tetapi ia bukan kontrak pengangkutan. Dalam keadaan ini tuntutan plaintif tidak wujud melalui perjanjian pengangkutan seperti yang diperlukan di bawah s 20(2)(h) Akta tersebut. Oleh itu, plaintif telah khilaf dalam membangkitkan bidang kuasa admiralti mahkamah ini dan tuntutan plaintif adalah remeh dan menyusahkan di bawah A 18 k 19(1)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 42, 47, 56 dan 76).

(2) Apabila tiada kontrak di antara plaintif dan defendan seperti yang diperlukan di bawah s 20(2)(h) Akta tersebut, tidak terdapat alasan yang sah untuk plaintif mendapatkan bil muatan yang bersih daripda defendan (lihat perenggan 63).

(3) Kuasa untuk mengeluarkan waran tangkap di bawah A 70 k 4 adalah mengikut budi bicara dan dengan itu harus dibuat secara judisial dengan menimbang prinsip kehakiman yang sedia ada, selepas mengambil kira semua fakta dan keadaan yang relevan, lebih-lebih lagi di dalam suatu permohonan ex parte yang merupakan permohonan *uberrimae fidei* yang memerlukan pendedahan fakta yang material secara penuh dan jujur (lihat perenggan 86).

(4) Defendan berjaya membuktikan kecuaian yang teruk dan niat jahat dan bahawa penangkapan kapal tersebut adalah salah,untuk yang mana defendan berhak diberikan ganti rugi (lihat perenggan 103).]

Notes

For cases on admiralty jurisdiction, see contract of carriage, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1151–1187.

For cases on arrest of ships, , see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 931–1106.

For cases on contract of carriage, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1360–1363.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241(refd)

AR Brown, McFarlane & Co v C Shaw Lovell & Sons and Walter Potts & Co [1921] Lloyd's Law Reports 36 (refd)

Boey Oi Leng v Trans Resources Corporation Sdn Bhd [2002] 1 CLJ 405 (refd)

'Boukadovra', The [1989] 1 Lloyd's Law Reports 393 (distd)

Brandt & Co & Ors v Liverpool, Brazil and River Plate Steam Navigation Co Ltd [1923] All ER 656 (refd)

British Imex Industries Ltd v Midland Bank Ltd [1958] 1 QB 542 (refd)

Brown, Jenkinson & Co Ltd v Percy Dalton (London) Ltd [1957] 2 All ER 844 (refd)

Columbus Line Reederei GmbH v Dodwell Shipping (Singapore) Pte Ltd [1997] 2 SLR 73 (refd)

Damayanti Kantilal Doshi & Anor v Jigarlal Kantilal Doshi [2004] 1 MLJ 456 (refd)

'Evangtlismos', The 14 ER 45 (refd)

Evmar, The [1989] 2 MLJ 460 (refd)

Kum and Another v Wah Tat Bank Ltd and another [1971] 1 Lloyd's LR 439 (refd)

Leong Peng Kheong & Anor v Downtree Properties Sdn Bhd [2002] 2 MLJ 186 (refd)

Maule, The [1995] 2 LRC192 (refd)

Middle East Tankers and Freighters v Owner of the Vessel and Other Interested Party In the Vessel of MV "IRA" [1996] 4 MLJ 109, 11(distd)

Nogar Marin, The [1988] 1 Lloyd's Law Reports 412 (refd)

Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor [1994] 1 MLJ 156 (refd)

Nordglimt', *The* [1987] 2 Lloyd's Law Report 470 (refd)

Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai) [1996] 4 MLJ 454 (refd)

Owners of the Ship or Vessel MT 'Rowan', The v The Owners of the Ship or Vessel or Property 'Singapura Timur' [2003] 2 MLJ 441 (refd)

Pyrene & Co Ltd v Scindia Steam Navigation Co Ltd [1954] 2 All ER 158 (distd)

Ralli Brothers v Paddington Steamship Company Limited; Mackintosh & Co (Third Parties) [1900] 5 Com Cas 124 (refd)

Schwarz & Co (Grain) Ltd v 'St Elefterio' (Owners) [1957] 1 Lloyd's LR 283-288(refd)

A *Societe Generate & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212 (refd)
St Merriel, The [1963] 1 All ER 537 (refd)
'Strathnaver' Walter Turnbull & Ors, The v The Owners of the Ship 'Strathnaver,' Her Cargo and Freight [1875] AC 58 (refd)
'The Damavand'; Owners of the Ship or Vessel 'Damavand' v International Paint Ltd [1993] 2 SLR 717 (refd)
B *'The Indriani'; Thye Nam Loong (S) Pte Ltd v Owners of the Ship or Vessel 'Indraini'* [1995] 3 SLR 381 (refd)
'The Santorini I'; Owners of Cargo carried in the Ship 'Santorini' v Owners of the Ship and Other Persons Interested in the Ship 'Santorini [1994] 3 MLJ 709 (refd)
Trade Star Line Corporation v Mitsui & Co Ltd [1996] 2 Lloyd's LR 449 (refd)
C *'Varna', The* [1993] 2 Lloyd's Law Report 253 (refd)
'Wigwam'; Inter Maritime Shipping (Pte) Ltd, The v MV 'Wigwam', Owners of [1983] 1 MLJ 148 (refd)
Wehner & Ors v Dene Steam Shipping Company & Ors [1905] 2 KB 92 (distd)

D **Legislation referred to**

Administration of Justice Act 1986 [UK] s 3(4)
Courts of Judicature Act 1964 s 24(b)
High Court (Admiralty Jurisdiction) Act (Cap 6) [Sing] s 3(1)9(i), (m)
Rules of the High Court 1980 O 70 r 4(3), (6) ,(7)
E Supreme Court Act 1981 [UK] ss 20(2)(h), 21(4), 24(6)

Ong Chee Kwan (Lee Ong & Kandiah) for the defendant.
Sitpah Selvaratnam (Tommy Thomas) for the plaintiff.

F **Low Hop Bing J**:

I Application

[1] This is an application in encl (20) by way of notice of motion filed by the defendant for an order:

G (1) to strike out the writ of summons and the warrant of arrest issued at the instance of the plaintiff against the defendant;

(2) damages to be assessed and paid by the plaintiff to the defendant; and

(3) costs.

H

II Factual background

[2] The plaintiff is a company incorporated in India having its registered address at B–16, Bhagwan Dass Nagar, New Delhi 110026, and carries on the business of export and import of commodities in particular agri-products and minerals.

I **[3]** The plaintiff's claim, inter alia, is for:

(1) a declaration that the defendant is under an obligation to issue a clean bill of lading dated 25 July 2004, acting through its master, servant or agent, in favour of the plaintiff; and

(2) an order that the defendant do issue a clean bill of lading dated 25 July 2004, acting through its master, servant or agent in favour of the plaintiff, and have the bill of lading delivered to the plaintiff or its authorized representative on or before 11 August 2004.

[4] On or about 28 June 2004, the plaintiff entered into a charterparty ('the charterparty') with Able Shipping Line, through Manco Shipping Co, for the use and hire of the Vessel MV Win Moony ('the Vessel'), for the carriage of 11,500 mt of bulk maize ('the cargo'), in return for payment of freight of USD25 per mt.

[5] Pursuant to cl 22 of the charterparty, 100% freight was to be paid to Able Shipping Line's nominated account within three banking days of completion of loading, or of release of a clean bill of lading marked 'freight payable as per charterparty'. A reference hereinafter to a clause is a reference to that clause in the charterparty unless otherwise stated.

[6] Clause 22 also provides that if the plaintiff required the bill of lading marked 'freight prepaid', such bill of lading will be released on receipt of 'Banker's Remittance T/T slip' evidencing payment of the freight.

[7] By cl 35, demurrage in relation to the use of the Vessel, if any, is to be settled within 10 days after completion of discharge of the cargo at Melaka.

[8] Clause 41 stipulates that disputes between the parties under the charterparty are to be resolved by arbitration in London.

[9] The Vessel was at all material time under voyage charter by Able Shipping Line from the defendant. The officers and crew of the Vessel, and the Vessel's agent Messrs GAC Shipping, Haldia ('GAG'), were appointed by the defendant, as servants and/or agents of the defendant.

[10] The defendant was at all material time aware of its obligation to load on board the Vessel 11,500 mt of cargo for the voyage from the Port of Loading to the Port of Discharge, pursuant to the Fixture Note between Able Shipping Line and the defendant, and the defendant's Notice of Readiness dated 10 July 2004 issued by GAG on behalf of the defendant in relation to the loading of 11,500 mt of cargo.

[11] In accordance with the charterparty, the plaintiff made available for loading, and carriage on board the Vessel, the cargo at the Port of Loading, Haldia, India ('the loading port') within the defined period of loading.

[12] The cargo to be carried on board the Vessel for delivery at the discharge port was subject to a contract of sale between the plaintiff and

Ghee Huat Co Pte Ltd ('the purchaser'). Payment by the purchaser for the cargo was by way of an irrevocable letter of credit issued in favour of the plaintiff ('the LC'). The LC expires on 23 August 2004, or 21 days from shipment of the cargo, whichever is the earlier.

[13] It was alleged that notwithstanding the availability of the cargo, the officers and crew of the Vessel, at the instructions of the defendant, wrongfully and in breach of duty sailed out of the loading port without loading 2933 mt of the cargo ('the shut-out cargo'), thereby causing the plaintiff to sustain loss, being the loss of value of the shutout cargo destined for sale to the purchaser, and the purchase price arising therefrom, based on the letter from the plaintiff's clearing agent, Guru Shipping & Clearing Pvt Ltd and the letter from Able Shipping Line dated 7 August 2004 confirming the shut-out cargo.

[14] The defendant acknowledged receipt on board the Vessel 8567 mt of the cargo on 25 July 2004, shipped by the plaintiff, and agreed with and represented to the plaintiff, to issue a bill of lading for the cargo evidenced, inter alia, by a Mate's Receipt dated 25 July 2004 issued by the chief officer of the Vessel on behalf of the defendant ('the mate's receipt').

[15] The plaintiff alleged that to date the defendant has failed to issue the bill of lading in respect of 8567 mt of the cargo received on board the Vessel, in breach of the defendant's express agreement and/or representation to do so, and contrary to the law, custom and practice of the shipping trade, despite the plaintiff's repeated request for the same.

[16] The plaintiff further alleged the defendant's breach of agreement, custom and practice, by failing to issue the bill of lading, notwithstanding the plaintiff's remittance of the full freight for 11,500 mt of the cargo, pursuant to the letter dated 7 August 2004 issued by Able Shipping Line, and the exchange of e-mails between the plaintiff and the defendant's agent, GAC.

[17] By reason of the defendant's alleged refusal to issue the bill of lading, the plaintiff was unable to comply with its terms of the contract of sale of the cargo to the purchaser, nor to satisfy the terms of the LC.

[18] As the LC expired on 23 August 2004, or 21 days from shipment of the cargo whichever is the earlier, the LC had to be negotiated by 14 August 2004, and unless the defendant issued the bill of lading on or before 13 August 2004, the plaintiff would suffer tremendous loss, including but not limited to the value of the cargo, and the price of the sale of the cargo to the purchaser, amounting to USD1,319,318 as the cargo could not be resold to any other party, nor could the cargo be utilized by the plaintiff, given the perishable nature of the cargo.

[19] In addition, the plaintiff would suffer irreparable damage in terms of its trading relationship with the purchaser, and its standing and reliability as a major exporter of commodities.

[20] The plaintiff's managing director believes that the purchaser has on-sold the cargo to Gymtech Feedmill (Malacca) Sdn Bhd ('Gymtech') pursuant to the letters dated 9 August 2004 and 10 August 2004 from Gymtech to the agent of the defendant in Melaka.

[21] It was further alleged that despite the shut-out of the shut-out cargo, the defendant wrongfully insisted on the payment of the full freight payable for 11,500 mt of the cargo.

[22] The plaintiff claimed to have made full payment of freight under protest and in response to the defendant's alleged illegal pressure and/or economic duress, and/or under threat of non-issuance by the defendant of the bill of lading. As a result, the defendant has allegedly received the sum of USD73,325 which is repayable to the plaintiff, pursuant to the invoice from the defendant's manager, Winland Shipping Co Ltd to Able Shipping Line instructing payment of the freight into the account of Best Line Shipping Ltd, the invoice from Able Shipping Line, the plaintiff's letter dated 3 August 2004 to Able Shipping Line and Winland Shipping Co Ltd, and the remittance application dated 3 August 2004 and remittance advice.

[23] Notwithstanding the alleged payment of full freight by the plaintiff, the defendant still refused to release the bill of lading, based on the fax dated 11 August 2004 from Able Shipping Line to the plaintiff stating that the defendant insisted on payment of the demurrage and shifting charges of USD138,000 before the bill of lading would be released.

[24] According to a search conducted with the Lloyd's Register, Fairplay's Shipfinder, an on-line register of ships, on 9 August 2004, the Vessel is registered under the ownership of Win Moony Shipping Co Ltd, with the manager recorded as Winland Shipping Co Ltd, which was also the party on whose instructions the freight of USD287,500 was remitted by the plaintiff in respect of the cargo on board the Vessel.

[25] The plaintiff's demands for issuance of the bill of lading have not been satisfied.

[26] The defendant is ready and willing to issue a bill of lading in the form annexed to its solicitors M/s Lee Ong & Kandiah's fax dated 1 August 2004, but the plaintiff alleged that such bill of lading had departed from the mate's receipt issued by the defendant to the plaintiff, and was claused so as to be rejected under the LC.

[27] The plaintiff alleged that no Master's Statement was ever sent to the plaintiff either on 26 August 2004 or at all and that the defendant was obliged to issue a 'Freight Prepaid' bill of lading upon full payment of freight, adding that the defendant's insistence on issuing 'freight payable as per the charterparty', and refusal to state 'Freight Prepaid' constituted the defendant's wrongful conduct.

III Jurisdiction and plaintiff's claim

1 Submissions

[28] For brevity and convenience, a reference to a section hereinafter is a reference to that section in the Supreme Court Act 1981 (UK) unless otherwise stated.

[29] Mr Ong Chee Kwan, learned counsel for the defendant, submitted that the plaintiff's claim does not fall within s 20(2)(h) and accordingly the admiralty jurisdiction of this court was not properly invoked, since there was no agreement relating to the carriage of goods in the Vessel between the plaintiff and the defendant. He relied on *AR Brown, McFarlane & Co v C Shaw Lovell & Sons and Walter Potts & Co* [1921] Lloyd's Law Reports 36; *Carver on Bills of Lading;* and *Ralli Brothers v Paddington Steamship Company Limited; Mackintosh & Co (Third Parties)* [1900] 5 Com Cas 124.

[30] It was also contended for the defendant that the plaintiff's purported action was really for an order compelling the defendant to issue to the plaintiff a clean bill of lading and not merely for breach of contract to issue a bill of lading and that the plaintiff has no legal basis to demand the defendant to issue a clean bill of lading, and for this contention, he is seeking support from *'Bills of Lading, Law and Practice'* by Alan Mitchelhill, (2nd Ed) Chap 8 'A Clean Bill of Lading'; *Carver on Bills of Lading,* (1st Ed) para 9-143; *The 'Boukadovra'* [1989] 1 Lloyd's Law Reports 393 and *The Nogar Marin* [1988] 1 Lloyd's Law Reports 412.

[31] Further, it was stressed that unless the plaintiff can show that it has a sustainable cause of action in personam against the defendant, the action in rem cannot be issued citing, inter alia, *The St Merriel* [1963] 1 All ER 537.

[32] It was contended for the defendant that the plaintiff's claim in this action in rem is frivolous and vexatious, apparently under O 18 r 19(l)(b) of the Rules of the High Court 1980.

[33] The view of the plaintiff's learned counsel Miss Sitpah Selvaratnam is diametrically opposite in that the plaintiff's claim is brought under s 20(2)(h) and s 21(4) as a valid claim which can properly be asserted in rem against the Vessel, as a result of which the Vessel can be arrested as security for the plaintiff's claim since the requirements of O 70 r 4(3), (6) and (7) have been satisfied.

[34] She added that the merits of the plaintiff's admiralty claim should be determined at the trial as, at this stage of the proceedings, the plaintiff has only to show the person who would or could be liable is the owner of the Vessel, on the basis of *Schwarz & Co (Grain) Ltd v 'St Elefterio' (Owners)* [1957] 1 Lloyd's LR 283–288; *The 'Wigwam'; Inter Maritime Shipping (Pte) Ltd v MV*

'Wigwam', Owners of [1983] 1 MLJ 148, 150; *Middle Bast Tankers and Freighters v Owner of the Vessel and Other Interested Party In the Vessel of MV 'IRA'* [1996] 4 MLJ 109, at p 117.

[35] It was also contended for the plaintiff that the test of jurisdiction is whether the owner of the Vessel is the person against whom the assertions of breaches are made, and that since there is no question of the Vessel not being owned by Win Moony Shipping Co Ltd, the jurisdiction to commence the action and to arrest the Vessel is clearly established, based on breaches of duty and obligation in contract within the meaning of s 20(2)(h), and is not frivolous or vexatious, as shown in *'St Elefterio'*; and 'The *Indriani'; Thye Nam Loong (S) Pte Ltd v Owners of the Ship or Vessel 'Indraini'* [1995] 3 SLR 381.

[36] Touching on the defendant's obligation in contract and tort in the capacity of bailee and carrier, the plaintiff's learned counsel referred to *'Carriage of Goods by Sea*' (2nd Ed) by John F Wilson, Emeritus Professor of Law, at p 126; *Carver on Bills of Lading,* Chapter 1 para 1-002 at pp 1 and 2; *Scrutton on Charterparties and Bills of Lading*, pp 298–303, 321–322, 332–333, 59–65, 80–87 and 176–178; *Trade Star Line Corporation v Mitsui & Co Ltd* [1996] 2 Lloyd's LR 449; *Pyrene Co, Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158; *Wehner & Ors v Dene Steam Shipping Company & Ors* [1905] 2 KB 92; *Brandt & Co & Ors v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1923] All ER 656; *Kum & Anor v Wah Tat Bank Ltd & Anor* [1971] 1 Lloyd's LR 439.

[37] It was also canvassed for the plaintiff that the defendant has breached the duty in contract and tort by way of non-issuance of a clean 'Freight Prepaid' bill of lading.

2 Question for determination

[38] In my view, the question to be determined under this head is:

> Whether the plaintiff's writ in rem together with the statement of claim and the warrant of arrest should be set aside on the ground that the jurisdiction of this court has been wrongly invoked and is therefore frivolous or vexatious under O 18 r 19(1)(b) of the Rules of the High Court 1980?

3 Order 18 r 19(1)(b)

[39] Order 18 r 19(1)(b), where relevant, reads as follows:

> 19 Striking out pleadings and endorsements (O 18 r 19)
>
> (1) The Court may at any stage of the proceedings order to be struck out … any pleading … on the ground that —
>
> (a) …; or
>
> (b) it is scandalous, frivolous or vexatious;

[40] In *Boey Oi Leng v Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, in the context of O 18 r 19(1)(b), I have the occasion to decide on the scope of the words 'frivolous or vexatious' as meaning wholly unnecessary or irrelevant, ie conspicuously unsustainable.

4 Admiralty jurisdiction

[41] The admiralty jurisdiction of our High Courts may be set out as follows:

(a) Section 24(b) of the Courts of Judicature Act 1964 confers upon our High Courts the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 (see also *The Owners of The Ship or Vessel Aft 'Rowan' v The Owners of The Ship or Vessel or Property 'Singapura Timur'* [2003] 2 MLJ 441);

(b) The admiralty jurisdiction of the English High Court is to be found in ss 20 and 21, in particular in the instant application, s 20(2)(h) in the following words:

> any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

(c) Under s 21, such admiralty jurisdiction may be exercised in an action in rem or in personam; and

(d) In respect of an action in rem, s 21(4) provides that in the case of a claim as is mentioned in, inter alia, s 20(2)(h), a writ of summons in rem may be issued where —

> (a) the claim arises in connection with a ship;
>
> (b) the person *who would be liable* on the claim in an action *in personam* ('*the relevant person*') *was, when the cause of action arose, the owner* or charterer of, or in possession or in control of, *the ship,*
>
> *an action in rem may* (whether or not the claim gives rise to a maritime lien on that ship) brought in the High Court against -
>
> - *that ship*, if at the *time when the action is brought the relevant person is* either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
> - any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it. (Emphasis added.)

[42] In relation to the instant writ, pursuant to s 20(2)(h), the jurisdiction of the court may properly be invoked if there is an agreement relating to the carriage of goods in the Vessel between the plaintiff and the defendant at the time the writ in rem was issued and the Vessel was arrested.

[43] For the purpose of s 20(2)(h), it is crucial to identify and determine the contractual relationship and commercial transactions between the various parties on the basis of the factual circumstances prevailing herein.

5 Contractual relationship

[44] The defendant's affidavit in encl (18) reveals a *charterparty* as the contract *between the defendant and the charterer* to whom the defendant addresses the invoice and looks for payment of the freight and other charges. The defendant sails to the loading port and issues the bill of lading pursuant to the terms of the charterparty. There is no trace of any nexus between the defendant and the plaintiff, in respect of any of these matters. There was no communication whatsoever between the plaintiff and the defendant prior to the delivery of the cargo to the defendant at the loading port.

[45] The *plaintiff's contractual relations are with the charterer by way of a contract of carriage; and the sale of the cargo to the purchaser* who opened the documentary letters of credit, with no involvement by the defendant in both these matters.

[46] As the plaintiff's claim is exclusively based on the mate's receipt issued by the defendant to the plaintiff, the agreement between the plaintiff and the charterer is not relevant to the plaintiff's claim against the defendant.

6 Mate's receipt

[47] *Carver on Bills of Lading* (1st Ed, 2001) p 372 *et seq* para 8-017 gives a comprehensive account of a mate's receipt. It 'is a document issued, on the receipt or shipment of goods, by or on behalf of the shipowner. It acknowledges his receipt of the goods and states their quantity and condition, and it may also state the name of the shipper or owner of the goods. Mate's receipts are preliminary or temporary receipts for the goods which may later be presented to the shipowner or his agent in exchange for bills of lading' (para 8-017).

[48] It is a 'simple receipt'; ... not ordinarily anything more than evidence that the goods have been received on board evidence as to the condition of the goods at the time of the receipt.' (para 8-018).

[49] 'A mate's receipt has been described as a chose in action, but it is not a contract of carriage.' (para 8-019).

[50] The learned author referred to *AR Brown*, *supra,* where Rowlatt J said:

> The mate's receipt, although it shows the person who is likely to get the contract of affreightment, and the person whom the shipowner regards as the owner of the goods, still is *not a contract of affreightment* It is exactly what it says it is, viz., a receipt by the ship that these goods have been brought on board the ship by someone, and it seems to me that he gives that receipt to the person who brings them, as the person who brings them, and not as the person who necessarily will be a party to the contract of affreightment (Emphasis added.)

[51] Evans LJ in delivering the judgment of the English Court of Appeal in *The 'Arctic Trader'*, concluded, inter alia, that unlike bills of lading, which achieve a contractual life of their own, the mate's receipt has effect only in relation to the charterparty and the shipowner's liabilities as bailee of goods in fact received on board.

[52] In *Kum & Anor, supra,* the issue before the Privy Council was whether there was a trade custom in Sarawak treating a mate's receipt as a document of title. Lord Devlin at p 442 left column made it clear that the mate's receipt is not ordinarily anything more than evidence that the goods have been received on board. The Privy Council did not hold that a mate's receipt is a contract of carriage.

[53] In *Ralli Brothers, supra,* the plaintiff was the shipper of the cargo on board the vessel 'Paddington' owned by the defendant who had entered into a charterparty with M & Co who in turn had sub-chartered the vessel to one CD & Co Under the charterparty between M & Co with the owner, the freight was 30s per ton. However, under the charterparty between CD & Co with the plaintiff-shipper, the freight was only 16s 6d. per ton. The owner who had no dealings with the shipper directed the vessel to the loading port at Bombay pursuant to the terms of its charterparty with M fit Co After the cargo was loaded on board the vessel, the plaintiff-shipper tendered a bill of lading for the master to sign based on the freight of 16s 6d instead of 30s. The master refused to sign the bill of lading and sailed the vessel with the cargo. The plaintiff-shipper subsequently paid the freight under protest to obtain delivery of the cargo and sued for the differential freight arguing that there was a contract at 16s 6d.

[54] Mathew J held that there was no contract between the shipper and the owner to carry the cargo at 16s 6d; that the owner was not bound to return the wheat to the shipper who was not entitled to recover the differential freight.

[55] The facts there were substantially similar to the facts in the instant application.

[56] In the circumstances, I hold that the plaintiff's claim does not arise out of an agreement of carriage as prescribed in s 20(2)(h).

7 Clean bill of lading

[57] After considering the plaintiff's cause of action, I am of the view that the plaintiff is in effect seeking an order to compel the defendant to issue a clean bill of lading.

[58] It is not disputed that the defendant was at all times ready and willing to issue a claused bill of lading but the plaintiff refused to accept it.

[59] This leads me to the consideration of the issue as to whether there is any legal basis for the plaintiff to obtain from the defendant a clean bill of lading. **A**

[60] In order to obtain a clean bill of lading, it is incumbent upon the plaintiff to establish that: **B**

(1) there is a contract between the plaintiff and the defendant;

(2) the defendant's charterparty with its charterer requires the defendant to issue a clean bill of lading or to issue a bill based on a mate's receipt; and

(3) the defendant as carrier has a duty to issue a clean bill of lading despite a contrary view taken by the carrier on the condition of the cargo as supported by contemporaneous documents. **C**

[61] *Alan Mitchelhill in Bills of Lading Law and Practice* (2nd Ed) at pp 48 and 49 referred to the differing definitions of what constitutes a clean bill of lading and opined that the most modern and accepted one was given in *British Imex Industries v Midland Bank Ltd* [1958], ie 'one that does not contain any reservations as to the apparent good order or condition of the goods or the packing.' **D**

[62] The words 'apparent order or condition' refer only to such condition as would be apparent on a reasonable examination of the goods: *The Nogar Marin, supra.* They do not refer to the internal condition of the goods on loading nor their quality. If the master or agent is aware of poor internal condition, this is 'apparent' to him even where it would not be to a normal observer and he should clause the bills, with the result that if this is not done, the carrier cannot later allege that condition. The duty does not require that the carrier state that the goods are in apparent good order or condition when they are not, even though these words are printed on the bill of lading. It requires an 'accurate statement of fact'; it is an unqualified or absolute undertaking' (*Carver on Bills of Lading,* para 9-143 1st ed 2001). **E** **F** **G**

[63] In the absence of any contract being the plaintiff and the defendant, as required under s 20(2)(h), I hold that there is no legal basis for the plaintiff to obtain from the defendant a clean bill of lading.

8 Authorities cited for plaintiff **H**

[64] I shall now consider the authorities cited for the plaintiff in order to ascertain if any support may be garnered for the plaintiff's case.

[65] *In Pyrene* & *Co*, the court had to decide whether the contract of carriage had commenced before the cargo was loaded on board the vessel and had proceeded on the existence of such a contract. That being the case, the issue there and that before me are clearly different. **I**

[66] The facts in *Wenher*, revealed that the bill of lading had been used, whereas in the instant case, the shipper merely possessed a mate's receipt. Hence the facts are distinguishable.

[67] The plaintiff in *Brandt*, was the holder of the bill of lading and had offered to take delivery of goods from the carrier which offer was accepted by the carrier on payment of the freight, as a result of which the Court of Appeal held that a contract existed but the facts before me are different in that the plaintiff herein had no bill of lading and hence no contract at all.

[68] In *Boukadoura*, at pp 398 and 399, Evans J held, inter alia, that contractual relations between the shipowner and the charterer are and always remain governed by the terms of the charterparty, but this does not mean that the master is bound to sign, or that the charterers may issue, a bill of lading in whatever terms the charterer chooses to demand, and that bills presented shall relate to goods actually shipped and that they shall not contain a misdescription of the goods which is known to be incorrect.

[69] In *St Elefterio,* the plaintiff's, transferees of bills of lading, had begun an action against the shipowners for damages arising out of the antedating of the bills of lading. The defendants applied to set aside the writ pursuant to s 3(4) of the Administration of Justice Act 1956 (UK) (now s 21). Willmer J declined to go into the merits of the various contentions in law advanced by the defendants and so the judgment must be seen in that light.

[70] *St Elefterio* was followed by Chua J of the Singapore High Court in *Wigwam, supra,* where the plaintiffs were claiming under s 3(1)(l) and (m) of the High Court (Admiralty Jurisdiction) Act (Cap 6) of Singapore under which the learned judge held that the plaintiff need not prove at the outset that he has a cause of action substantial in law. There was also *no suggestion that the proceedings were frivolous or vexatious.* Further, *the affidavits had disclosed conflicting evidence which could only be resolved after a full hearing.* In those circumstances, the learned judge dismissed the defendant's motion.

[71] *St Elefterio*, and *Wigwam*, were followed by Haidar J (now CJ(M)) in *Middle East Tankers*, where on 24 February 1995, the plaintiff filed an admiralty action in rem, against the defendant, the owner of the vessel MV 'IRA' ('the ship'), claiming USD82,859.06, being the cost of bunker fuels supplied to the ship allegedly at the request of the defendant in November 1994. The plaintiff claimed that it had entered into a contract with the defendant for the supply of bunker fuels to the ship, and the sum remained unpaid. The defendant denied having contracted with the plaintiff for the supply of bunker fuels. The defendant was the owner of the ship both in November 1994 and at the date of the issue of the writ. However, the charterer of the ship in November 1994 was Orion Maritime Ltd ('Orion'), but it was no longer the charterer at the time the writ was issued. On 13 March 1995, solicitors entered *unconditional appearance* for the defendant and

filed the defence on 27 April 1995. On 3 August 1995, the defendant filed a summons-in-chambers under O 18 r 19 of the Rules of the High Court 1980 to strike out the plaintiff's writ and statement of claim.

[72] The defendant's application was dismissed on three grounds, *viz*:

(a) After *unconditional appearance* has been entered by the defendant, the issue as to whether the defendant is liable is a matter for trial;

(b) There was no requirement that before the plaintiff could proceed in its claim in *rem*, it must prove that it had a cause of action substantial in law; and

(3) On the facts, the plaintiff's claim is not frivolous or vexatious.

[73] The facts in *Middle East Tankers*, are distinguishable in that *the defendant herein has entered a conditional appearance* and so is entitled to apply to set aside the writ and the warrant of arrest. It is settled law that a defendant who has entered an unconditional appearance such as in *Middle East Tankers*, has waived the right to invoke O 18 r 19 on the ground that the pleading is frivolous or vexatious: per Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd* & *Ors* [1995] 1 MLJ 241 FC at p 259; and followed by Azmel J in *Leong Peng Kheong & Anor v Downtree Properties Sdn Bhd* [2002] 2 MLJ 186 at p 192E–F)

[74] In *The St Merriel*, the plaintiffs having done repair work to the mv St Merriel in their shipyard, the work including owners' repairs, issued a writ in rem against the defendants, the owners of the vessel, claiming the costs of the owners' repairs. At all material times the vessel was chartered by demise to BCC Ltd There was no contract with the defendants for carrying out the repairs, but apparently arrangements concerning repairs had been conducted between agents of the charterers and the plaintiffs. The defendants moved to set aside the writ on the grounds that the action was brought against the wrong persons and that proceedings in rem were not allowable Hewson J did not follow the judgment of Willmer J in *St Elefterio*, but held that the person who would be liable would be the person who when the cause of action arose made the contract for the repair by the plaintiff; and that there was no contract, express or implied, between the owners and the repairers, as a result of which the writ was set aside. Further, Hewson J explained that the purpose of s 3(4) of the Administration of Justice Act 1956 (UK) (now s 21) was to identify the person or persons whose ships may be arrested and that such identification is a question of fact.

[75] After considering the authorities cited for the plaintiff, I am unable to uphold the contention advanced for the plaintiff.

[76] The answer to the aforesaid question for determination is in the affirmative. I therefore hold that the plaintiff has wrongly invoked the

admiralty jurisdiction of this court and that the plaintiff's claim is frivolous or vexatious under O 18 r 19(1)(b).

IV Non disclosure of material facts

[77] In seeking to set aside the warrant of arrest, an alternative contention was raised for the defendant i.e. the plaintiff's failure to disclose material facts in the affidavit leading to the arrest. '*The Evmar*' [1989] 2 MLJ 460 and '*The Damavand'; Owners of the Ship or Vessel 'Damavand' v International Paint Ltd* [1993] 2 SLR 717 were cited.

[78] The plaintiff responded that all documents have been placed before the court pursuant to O 70 r 4 of the Rules of the High Court 1980, adding that disputed facts need not be disclosed, relying on '*The Santorini I'; Owners of Cargo carried in the Ship 'Santorini I' v Owners of the Ship and Other Persons Interested in the Ship 'Santorini I'* [1994] 3 MLJ 709; and *Societe Generate & Ors v City Holdings (Pte) Ltd & Anor* [1991] 2 MLJ 212.

[79] It was also contended for the plaintiff that the documents between Able Shipping Line and the defendant are not in the plaintiff's possession and that the plaintiff cannot be expected to disclose these documents, which even if inaccurate would not affect the issuance of the warrant of arrest, as they were unintentional, given that several intermediate parties and representatives were involved in this transaction. Support was sought in *Noor Jahan bte Abdul Wahab v Md Yusoff bin Amanshah & Anor* [1994] 1 MLJ 156; *Damayanti Kantilal Doshi* & *Anor v Jigarlal Kantilal Doshi* [2004] 1 MLJ 456; and *The 'Nordglimt'* [1987] 2 Lloyd's Law Report 470.

[80] I shall first consider the authorities cited for the plaintiff.

[81] In *The 'Nordglimt'*, *supra,* Hobhouse J held that the plaintiff's inaccurate facts in the affidavit was immaterial in that with the substitution of the correct date and correct quantity of the cargo, the position would have been precisely the same.

[82] In *'The Santorini I' supra*, at p 714B, although VC George J (later JCA) held, *inter alia,* that the non-disclosure of negotiations and attempts to mitigate the damage were not material to the issuance of a warrant of arrest, the learned judge added that O 70 r 4 of the Rules of the High Court 1980 specifies what has to be disclosed to the court in support of the praecipe for a warrant of arrest of a ship. The learned judge added that no doubt other material information should also be provided.

[83] In *The Evmar, supra*, at p 462I rt–463A left, although Chao Hick Tin JC (now JA) of the Singapore High Court held that the non-disclosure of an arbitration clause was not material, the learned judge nevertheless explained that the plaintiff in filing an *ex parte* application for the issue of the warrant of arrest must make a full and frank disclosure of all material facts known to the

plaintiff, and a failure to do so may result in the setting aside of the *ex parte* order, even though the facts were such that, with full disclosure, an order would have been justified.

[84] In *'The Damavand', supra,* the Singapore Court of Civil Appeal in a judgment delivered by LP Thean J at p 73 E–F held 'that the prior arrest of vessel Minab 4 etc was not a material fact', but said 'that the test of materiality is whether the fact is relevant to the making of the decision whether or not to issue the warrant of arrest, that is, a fact which should properly be taken into consideration when weighing all the circumstances of the case, though it need not have the effect of leading to a different decision being made.'

[85] In *The 'Varna'* [1993] 2 Lloyd's Law Report 253, at p 255 col 2, there was a non-disclosure of proceedings relating to the matter before the courts in Bulgaria, and so Curtis J and on appeal to the Court of Appeal, set aside the warrant of arrest.

[86] In my view, the power to issue a warrant of arrest under O 70 r 4 is discretionary and the discretion being a principled discretion must be exercised judicially having regard to all established judicial principles, after taking into account all relevant facts and circumstances, more so in *ex parte* applications which are applications *uberrimae fidei* (of the utmost good faith) requiring full and frank disclosure of all material facts.

[87] Hence, it is necessary for me to consider whether the plaintiff has failed to disclose material facts in obtaining the warrant of arrest.

[88] Upon a proper perusal of the plaintiff's affidavit in support of the ex parte application, it is eminently evident to me that the plaintiff has failed to disclose that:

1 The plaintiff has not paid the full freight when, according to cl.9 of the charterparty between the defendant and the charterer, the defendant is only obliged to issue the bill of lading when the full freight has been collected.

2 The plaintiff has failed to produce the charterparty as an exhibit to the affidavit in support of the issuance of the warrant of arrest;

3 Defendant's readiness and willingness to issue a claused bill of lading; and

4 Plaintiff's actual notice of the condition of the cargo as the plaintiff's own purchaser had issued a letter dated 26 July 2004 putting the plaintiff on notice that it may reject the cargo on the ground that the cargo may not stand the journey.

5 The plaintiff's real purpose is to obtain a mandatory injunction to compel the defendant to issue a clean bill of lading, when the original

mate's receipt issued to the plaintiff did not contain the notation 'clean on board'.

[89] At this juncture, it is appropriate to refer to *'The Nogar Mann'* (CA) and *'The Arctic Trader'* (CA), both of which establish that the master of a vessel has no legal obligation to issue a clean bill of lading even if the mate's receipt had in fact been marked 'clean on board'.

[90] Further, in *Columbus Line Reederei GmBH v Dodwell Shipping (Singapore) Pte Ltd* [1997] 2 SLR 73, Christopher Lau JC of the Singapore High Court held, at p 83, para 36, inter alia, that where an agent was aware that cargo had been stowed on deck, there was a duty imposed on him to clause the bill of lading with an on deck remark, notwithstanding the absence of such a remark in the mate's receipt. Indeed, any misrepresentation of the condition of the cargo on a bill of lading gives rise to the tort of deceit: *Brown, Jenkinson* & Co *Ltd v Percy Dalton (London)* Ltd [1957] 2 All ER 844;

[91] I am mindful of the well-considered judgment delivered in *Noor Jahan*, by Edgar Joseph Jr SCJ sitting as a High Court judge who observed that it did not necessarily follow that the plaintiff's failure to disclose the facts of the defendant's case would result in the discharge of an ex parte injunction obtained by the plaintiff, for the court would still have to consider whether justice requires the injunction to continue.

[92] I am also aware that *Noor Jahan* has been applied by the Court of Appeal in *Damayanti Kantilal*, in another application for ex parte injunction, in which the Court of Appeal, through the judgment of Richard Malanjum JCA, held, inter alia, that the justice of the case should be considered.

[93] The above two dicta cited for the plaintiff must be seen in the light of the consideration of the justice of the case which is indeed the consideration in the instant application.

[94] Having regard to the justice of the instant application, I hold that the plaintiff's non-disclosure as enumerated above are in relation to material facts which are relevant to the decision whether or not to issue the warrant of arrest, and that they constitute material misrepresentations to the court for the purpose of obtaining the warrant of arrest, as a result of which the warrant of arrest should be set aside (see also *Ocean Gain Shipping Pte Ltd v Owner and/or Charterer of Demise of Vessel Dong Nai Registered at Haiphong Port, Vietnam (The Dong Nai)* [1996] 4 MLJ 454 pp 464D and 465B).

V Damages for wrongful arrest

[95] On the basis of *The Maule* [1995] 2 LRC 192, the defendant herein prays for damages for wrongful arrest of the vessel on 10 August 2004.

[96] Plaintiff pleaded the absence of malice or gross negligence and submitted that damages would not necessarily follow the setting aside of the warrant of arrest, citing *The 'Evangelismos',* 14 ER 945; and *The 'Strathnaver' Walter Turnbull and Others v The Owners of the Ship 'Strathnaver' Her Cargo and Freight* [1875] AC 58.

[97] In my judgment, it is essential to state succinctly that the arrest of a vessel is a drastic measure capable of bringing about substantial loss to the carrier who is also exposed to breaches of contracts with other third parties.

[98] In *Evangelismos*, a collision took place at sea. The vessel which caused the damage got away. The owners of the damaged vessel caused a foreign vessel to be arrested to answer an action for damages. The vessel was detained for some months before she was released on bail. The plaintiff failed in identifying the vessel seized as being the one causing the damage. The Admiralty Court dismissed the action with costs, refusing to award damages, on the ground that there was no evidence of malice or gross negligence which implies malice. However, the Court of Appeal stated categorically that, there may be cases in which mala fides, or that *crassa negligentia,* which implies malice, which would justify a Court of Admiralty giving damages, eg where the action was so unwarrantingly brought, or brought with so little colour, or so little foundation, that it implies malice on the part of the plaintiff, or that there was gross negligence which is equivalent to it.

[99] That statement was approved by the Privy Council in *The 'Strathnaver'*.

[100] The abovesaid two authorities were applied in *The Maule*, by the Hong Kong Court of Appeal which expounded the principles relating to malice for the purposes of awarding damages for wrongful arrest as follows:

> Malice existed unless the plaintiff's predominant wish was the enforcement of his claim by a sincere use of the process of arrest. Where the plaintiff's conduct in arresting the ship was in bad faith in that the plaintiff's intention was either to harm the shipowner or put pressure on him to accede to the demand in the knowledge that the arrest of the ship was not legitimate, it could be described as malicious negligence and damages for wrongful arrest would be a proper remedy to grant to the shipowner. The competence or otherwise of the legal advice on which the plaintiff acted was also a relevant factor to be taken into account by the court in reaching such a conclusion.

[101] I shall now consider whether there was any malice or gross negligence on the part of the plaintiff in obtaining the warrant of arrest.

[102] It is abundantly clear to me that on the facts of the instant case, there was:

(1) no contract between the parties herein;

(2) no duty on the part of the defendant to issue a clean bill of lading;

(3) non-disclosure of material facts in the plaintiff's application for the warrant of arrest;

(4) clear knowledge on the part of the plaintiff that the condition of the cargo was disputed; and

(5) the plaintiff's motive was to compel or secure the defendant's clean bill of lading so as to satisfy the requirement of a documentary letter of credit without due regard to the defendant's duty as a carrier.

[103] On the aforesaid finding, I am of the view that the defendant has successfully established malice or gross negligence as expounded in *The Maule*, and that the arrest of the Vessel is wrongful, for which the defendant is entitled to an award of damages.

[104] My view is fortified by the judgment of Abdul Malik Ishak J in *The Dong Nai*. There, when the plaintiff had successfully secured the arrest of *The Dong Nai*, they knew that they had to pay for the costs of the shore cranes; they also knew that they had requested for the change of the discharge port at Pasir Gudang from Port Klang and, finally, they also knew that there was no claim made or will be made by the shippers and/or consignors against them for the sum of USD42,500. Given this scenario, the learned judge held that malice had been established against the plaintiff's, with the result that the defendants were entitled to damages.

VI Conclusion

[105] By reason of the foregoing grounds, I make an order in the following terms:

(1) the plaintiff's writ and statement of claim, and consequently the warrant of arrest are hereby set aside;

(2) the warrant of arrest is also set aside by reason of non-disclosure of material facts ;

(3) for wrongful arrest of the Vessel, the defendant is awarded damages to be assessed by the registrar of this court; and

(4) costs of this application to be taxed by the registrar of this court and to be paid by the plaintiff to the defendant.

Application allowed with costs.

Reported by AG Kalidas